

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FIDENCIO RODRIGUEZ HERNANDEZ,)
Petitioner-Defendant,) Case No. C10-1674-JLR-BAT
(CR09-414-JLR)
v.)
UNITED STATES OF AMERICA,) REPORT AND
Respondent-Plaintiff.) RECOMMENDATION

INTRODUCTION

Petitioner, Fidencio Rodriguez Herndandez, filed a 28 U.S.C. § 2255 motion to vacate or correct the twenty month sentence the Court imposed on March 22, 2010 in CR09-414-JLR. Dkt. 1.¹ He argues his sentence was imposed in violation of the law and requests resentencing “by a period of up to 18 months.” *Id.* at 17. This matter has been referred to United States Magistrate Judge Brian Tsuchida. Dkt. 4. Because petitioner waived his right to appeal or bring a collateral attack against his conviction and sentence, and his claims that his sentence violates the law are meritless, the Court recommends the § 2255 motion be **DENIED** and that the case be

DISMISSED.

¹ Dkt. refers to C10-1674-JLR-BAT; CR. refers to CR09-414-JLR, the underlying criminal conviction.

BACKGROUND

I. Criminal Proceedings

After entering into a plea agreement, petitioner pled guilty to two counts of unlawful entry by eluding examination and inspection by immigration officers under 8 U.S.C. § 1325(a)(2). CR. 14. As part of the plea agreement, petitioner agreed that he had a base offense level of 8 under USSG § 2L1.2(a) and that it should be increased sixteen levels because of his prior felony drug trafficking conviction for which he received a fifteen month prison sentence. *Id.* at 5. The plea agreement reveals that the advisory Guideline range was forty-one to fifty-seven months of imprisonment. *Id.* However, the crimes petitioner pled guilty to have a combined statutory maximum of thirty months, and the government agreed in paragraph seven of the plea agreement to recommend a sentence of imprisonment of twenty-nine months. *Id.* at 5-6. The Plea Agreement signed by petitioner also contained an appeal waiver which states:

As part of this Plea Agreement, and on the condition the Court imposes a custodial sentence that does not exceed the twenty-nine (29) month sentence recommended by the government at paragraph 7 above, Defendant waives to the full extent of the law:

- a. any right conferred by Title 18, United States Codes, Section 3742 to appeal the sentence, including any restitution order imposed; and
- b. any right to bring a collateral attack against the conviction and sentence including any restitution order imposed, except as it may relate to the effectiveness of legal counsel.

Id. at 8.

On March 22, 2010, petitioner appeared for sentencing. CR. 21. The government submitted a sentencing memorandum recommending a total sentence of twenty-four months in prison. CR. 19 at 3. After reviewing the probation department's presentence report, the government submitted that it would be appropriate for the court to impose a sentence that was lower than the recommendation

1 contained in the plea agreement. The government deemed a lower sentence appropriate because
2 petitioner had only one prior drug offense and it was a seven year-old conviction. Yet, this single
3 offense had significantly increased the Guideline range. *Id.* at 4. Petitioner submitted a sentencing
4 memorandum recommending a sentence of twelve months and one day. CR. 18 at 1. In his
5 sentencing memorandum, petitioner acknowledged the Guideline range for his offenses was at or in
6 excess of forty-one to fifty-one months. *Id.* at 2. However, petitioner argued a substantial variance
7 from that range was appropriate because: (1) twelve months is a sentence that is sufficient but not
8 greater than necessary to meet the statutory purposes of sentencing; (2) his personal history and
9 characteristics support the sentence; (3) the sentence is sufficient to deter petitioner from
10 committing future crimes and to protect the public; (4) the sentence would promote respect for the
11 law and is just punishment under the circumstances; and (5) the sentence would prevent petitioner
12 from getting an unwarranted disparate sentence. *Id.* at 3-16.

13 The Court sentenced petitioner to a total of twenty months of imprisonment and the
14 mandatory \$110 special assessment, but waived imposition of a fine. CR. 21. Petitioner did not
15 file a direct appeal. *See* Dkt. 1.

16 **II. Section 2255 Proceedings**

17 On October 13, 2010, petitioner filed the present § 2255 motion. He raises the following
18 claims for relief:

19 1) The district court failed to comply with Fed. R. Crim. P. 11, and
20 the U. S. Constitution in taking Movant's guilty plea by advising
21 him of his rights, by assuring that his plea was knowing and
22 voluntary(by, inter, alia, accurately informing him of the full range
23 of punishment to which he was exposed), and assuring that there
was an adequate factual basis for his plea. And, there was breach of
the plea agreement justifying reversal of Movant's conviction or
sentence. Accordingly, because the record indicates that defendant's
plea was unknown, non-understandingly, and in voluntarily made

1 and factually supported, there is basis for reversal of his conviction.
2 Likewise colorable base exist to attack the sentence.

3 2) Movant's within-guideline sentence was unreasonable because it
4 was greater than necessary to meet the sentencing goals of 18. U. S.

C. § 3553(a).

5 3) The sentencing court committed reversible error, and Movant
6 unknowingly, and involuntarily waived his right to appeal his
7 sentence as part of the plea agreement.

8 4) Movant's ineligibility for minimum security confinement, drug
9 program, and pre-release custody as a result of his status as a
10 deportable alien constituted significant mitigating factors that should
11 have been considered by the sentencing court.

12 5) 36-months sentence of imprisonment imposed by the court was
13 unreasonable, where it: derived from in anomalous guideline
14 provision exclusively basis offense level increases on prior
15 convictions; did not reflect the unique indicating circumstances
16 underlying movant for having just one prior conviction; and
17 punished movant for just one presumption of illegal possession than
18 the bare minimum number of involvement that occurs in any drug
19 possession.

20 6) The District Court erred by concluding that movant's conviction
21 for simple assumed involvement of possession was a trafficking
22 offense, and there are for an aggravated felony under guideline §
23 twoL1.2(b)(1)(c). In the absence of state recidivist proceedings.

24 Dkt. 1.

25 DISCUSSION

26 I. Legal Standards

27 Under 28 U.S.C. § 2255, a federal prisoner may move the sentencing court to vacate, set
28 aside or correct the sentence on the grounds that the sentence was imposed in violation of the
29 Constitution or laws of the United States. “A district court must grant a hearing to determine the
30 validity of a petition brought under that section, ‘[u]nless the motions and the files and records of
31 the case conclusively show that the prisoner is entitled to no relief.’” *United States v. Blaylock*, 20

1 F.3d 1458, 1465 (9th Cir. 1994) (quoting 28 U.S.C. § 2255). The Court may deny a hearing if the
2 prisoner's allegations fail to state a claim for relief or "are so palpably incredible or patently
3 frivolous as to warrant summary dismissal." *United States v. McMullen*, 98 F.3d 1155, 1159 (9th
4 Cir. 1996).

5 **II. Petitioner Waived His Right To Collaterally Attack His Sentence**

6 Petitioner signed a Plea Agreement waiving his right to appeal or collaterally attack his
7 sentence. A criminal defendant's waiver of his right to appeal or collaterally attack his sentence is
8 enforceable if "(1) the language of the waiver encompasses the defendant's right to appeal on the
9 grounds claimed on appeal, and (2) the waiver is knowingly and voluntarily made." *United States*
10 *v. Martinez*, 143 F.3d 1266, 1270-71 (9th Cir. 1998) (internal citations and quotations omitted).

11 Petitioner's Plea Agreement contains a clear and unambiguous waiver of the right to
12 appeal or bring a collateral attack, so long as the sentence imposed did not exceed the agreed-upon
13 twenty-nine months. CR. 14 at 8. Petitioner received a twenty month sentence, thus the waiver of
14 his appeal rights applies with full force.

15 Petitioner claims his appeal waiver was "involuntary," but presents nothing to support this
16 unfounded allegation. Dkt. 1 at 8. When a § 2255 petitioner makes such bald assertions, a district
17 court has the discretion to dismiss the motion without an evidentiary hearing. *Cf. United States v.*
18 *Howard*, 381 F.3d 873, 879 (9th Cir. 2004) (where a petitioner's claim of incompetence is bald,
19 conclusory or inherently incredible, a court has the discretion to dismiss the claim without an
20 evidentiary hearing). Further the record shows petitioner's waiver was not 'involuntary.' The
21 Plea Agreement signed by petitioner provides, "Defendant agrees that he has entered into this Plea
22 Agreement freely and voluntarily, and that no threats or promises, other than the promises
23 contained in the plea agreement, were made to induce Defendant to enter this plea agreement."

1 CR. 14 at 8. The record further reveals that between petitioner's guilty plea in December of 2009
2 and his sentencing in March of 2010, he never once asserted that his plea was "involuntary."

3 Accordingly, the Court finds petitioner's § 2255 motion should be dismissed because the
4 waiver of the rights to appeal or bring a collateral attack is unambiguous and was knowingly and
5 voluntarily made.

6 **III. Petitioner's Claims Have no Merit**

7 Even if petitioner had not waived his right to appeal or bring a collateral attack, his § 2255
8 motion should be dismissed because all of his claims lack merit.

9 **A. Claim One**

10 Petitioner argues in claim one that his plea agreement was not "knowing and voluntary"
11 because he was not informed of "the full range of punishment to which he was exposed" and there
12 was no "adequate factual basis for his plea." Dkt. 1 at 5. The record contains no support for this
13 claim. The plea agreement clearly set forth the maximum penalties petitioner faced—six months
14 for count one and twenty-four months for count two. CR. 14 at 2-3. Petitioner was thus made
15 aware of these penalties and in fact later referenced them in his own sentencing memorandum. CR.
16 18 at 5. At no time prior to or during sentencing did petitioner ever indicate he did not understand
17 the maximum sentence he faced.

18 Petitioner's assertion that there is no factual basis for the plea is utterly without merit. The
19 statement of facts contained in the plea agreement sets forth a fully adequate factual basis for
20 petitioner's plea. Those facts are as follows:

21 (a) My true name is Fidencio Rodriguez-Hernandez. I am a citizen
22 of Mexico. I was born in Mexico in 1984.

23 (b) I made an unlawful entry into the United States, at or near San
Ysidro, California, on or about March 27, 2004, by eluding
examination and inspection by Immigration officials.

1 (c) I was deported/removed on March 29, 2005, at El Paso, Texas.
2 After that deportation, I made another unlawful entry into the United
3 States on or about April 10, 2005, at or near Tecate, California, by
4 eluding examination and inspection by Immigration officials.
5

6 (d) I was convicted in the Superior Court of Washington for
7 Cowlitz County, in cause number 03 - 1-01009 -7, for the offense of
8 delivery of heroin and sentenced to a term of imprisonment of 15
9 months on September 4, 2003.

10 (e) On or about November 8, 2009, I was found in Everson,
11 Washington, by Immigration Officials when I was arrested during a
12 traffic stop made by the Everson Police Department. I have never
13 had permission to enter the United States from any United States
14 official, including the Secretary of the Department of Homeland
15 Security. I entered the United States knowingly and voluntarily.
16

CR. 14 at 6.

17 In claim one petitioner also argues there was a “breach of the plea agreement justifying
18 reversal of Movant’s conviction or sentence.” However, he presents nothing to show a breach
19 occurred. The record contains no indication the government breached any of the terms of the plea
20 agreement. In fact, the government ultimately recommended a sentence that was lower than the
21 sentence it promised to recommend in the plea agreement. As there is no evidence to support
22 petitioner’s contentions, the Court recommends claim one be dismissed with prejudice.
23

B. Claim Two

17 In this claim, petitioner argues that his “within-guideline sentence was unreasonable because
18 it was greater than necessary to meet the sentencing goals of 18. U. S. C. § 3553(a).” Petitioner
19 faced statutory maximum sentences of six and twenty-four months for Counts I and II, respectively.
20 He agreed his Guideline range was forty-one to fifty-one months. Accordingly, his Guideline range
21 is thirty months under USSG § 5G1.2. Because petitioner received a below Guideline sentence of
22 twenty months, this argument has no merit and claim two should be dismissed with prejudice.
23

1 **C. Claim Three**

2 In claim three, petitioner states “[t]he sentencing court committed reversible error, and
3 Movant unknowingly, and involuntarily waived his right to appeal his sentence as part of the plea
4 agreement.” Petitioner argues his sentence should be reversed because “he invalidly waived his
5 right to appeal” and his plea was “unlawfully induced.” Dkt. 1 at 8. However, if petitioner’s plea
6 was “unlawfully induced,” his remedy is to permit him to withdraw his guilty plea, not to grant him
7 a resentencing. Petitioner, of course, has not sought to withdraw his plea because if he did, the plea
8 agreement he entered into would be void. The government would then be free to charge him with
9 the more serious crime of illegal reentry after deportation under 8 U.S.C. § 1326, which carries a
10 statutory maximum of at least ten years in prison. Because petitioner failed to identify any
11 sentencing errors in this claim and because he does not seek to withdraw his guilty plea, claim three
12 should be dismissed with prejudice.

13 **D. Claim Four**

14 In this claim, petitioner argues the sentencing court erred in failing to consider as mitigating
15 factors his “ineligibility for minimum security confinement, drug program, and pre-release custody
16 as a result of his status as a deportable alien.” The record contains no indication that petitioner
17 raised this argument at sentencing. Thus, petitioner cannot now claim the sentencing court erred
18 when he did not raise these issues at the time of sentencing. *See U.S. v. Si*, 343 F.3d 1116, 1128
19 (9th Cir. 2003). Accordingly, this claim should be dismissed with prejudice.

20 **E. Claim Five**

21 In claim five, petitioner argues the “36-months sentence of imprisonment imposed by the
22 court was unreasonable” because it was based on a Guideline provision that relies on a prior
23 conviction and does not account for petitioner’s personal circumstances which include having “one

1 prior conviction" for a drug crime involving a small amount of drugs. Dkt. 1 at 11. This argument
2 fails on its face. First, the sentencing court sentenced petitioner to twenty months of prison, not
3 thirty-six months. Second, the sentence a court imposes is reasonable if no procedural errors were
4 committed and if the sentence is substantively reasonable. *United States v. Carty*, 520 F.3d 984,
5 993 (9th Cir. 2008) (en banc). Nothing in the record shows the court erred in calculating
6 petitioner's sentencing range under the Guidelines, or failed to consider the § 3553(a) factors and
7 advisory nature of the Guidelines, facts which would establish procedural error. Hence, the sole
8 issue is whether petitioner's sentence is substantively reasonable. Here, the sentencing court
9 considered petitioner's arguments. Petitioner argued in his sentencing memorandum that his
10 personal circumstances compelled a lower sentence. Petitioner discussed that he was poor, had a
11 family whom he loved, had minimal criminal history, and became addicted to heroin which
12 "culminated in low level dealing of heroin and an arrest and conviction in Kelso, Washington" for
13 selling less than six grams of heroin to an undercover informant. CR. 18 at 3. During sentencing,
14 petitioner's counsel also argued that the sentencing guideline applicable to petitioner's case was
15 designed for more serious offenders than petitioner, overstating the sentence to be imposed in
16 petitioner's case. *Id.* at 6-8. Additionally, the government urged the court to impose a sentence
17 below twenty-nine months because petitioner had only one prior drug offense that was seven years
18 old on his record, but this single offense had caused a significant increase in the Guideline range.
19 CR. 19 at 3.

20 In *Rita v. United States*, 551 U.S. 338, 347 (2007), the Supreme Court held that a court of
21 appeals may presume that the sentence is reasonable when a district judge's discretionary decision
22 accords with the sentence that the Commission deems appropriate. Although the Ninth Circuit has
23 not adopted the "presumption of reasonableness" for sentences imposed within the Guidelines

1 range, the law of the circuit nonetheless is that “that a correctly calculated Guidelines sentence will
 2 normally not be found unreasonable on appeal.” *Carty*, 520 F.3d at 988. After considering the
 3 parties’ arguments and petitioner’s circumstances, the Court sentenced petitioner to twenty months,
 4 five months lower than the sentence requested by the government and the probation department,
 5 and also lower than the Guideline range. Given these circumstances, petitioner’s claim of an
 6 unreasonable sentence is groundless and should be dismissed.

7 **F. Claim Six**

8 In this claim, petitioner argues the Court erred by finding that his past conviction in a drug
 9 trafficking offense was an aggravated felony under USSG § 21.2(b)(1)(c). Dkt. 1 at 12. Relying on
 10 *Carachuri-Rosendo v. Holder*, 130 S.Ct. 2577 (2010), petitioner argues his “last conviction for
 11 simple assumed involvement of possession was not a trafficking crime and thus not an aggravated
 12 felony.” Dkt. 1 at 12. In *Carachuri-Rosendo* the Supreme Court addressed whether a misdemeanor
 13 drug possession offense committed after the conviction for a first misdemeanor possession offense
 14 became final is always an aggravated felony for purposes of deportation proceedings. *Carachuri-*
 15 *Rosendo*, 130 S.Ct. at 2580. The Supreme Court held that “second or subsequent simple possession
 16 offenses are not aggravated felonies under § 1101(a)(43) when, as in this case, the state conviction
 17 is not based on the fact of a prior conviction.” *Id.*

18 *Carachuri-Rosendo* thus lends no support to petitioner’s claim because petitioner’s prior
 19 conviction was a trafficking offense, not mere possession. Petitioner’s attempts to argue otherwise
 20 are meritless. Petitioner stipulated in his plea agreement that he was convicted of Delivery of
 21 Heroin in Cowlitz County Superior Court and sentenced to fifteen months in prison. He affirmed
 22 this fact in his sentencing memorandum by acknowledging he sold six grams of heroin to an
 23 undercover informant and went to prison. A drug trafficking offense means an offense that

1 prohibits the distribution, dispensing or offer to sell a controlled substance. *See* USSG §
2 21.2(b)(1)(c), comment (n.1(B)(iv)). Because the sale of heroin is a drug-trafficking offense,
3 petitioner's arguments under *Carachuri-Rosendo* are of no merit and should be dismissed.

4 **IV. Need for an Evidentiary Hearing**

5 If a prisoner's allegations do not state a claim for relief or are so palpably incredible as to
6 warrant summary dismissal, a court need not hold an evidentiary hearing. *Shah v. United States*,
7 878 F.2d 1156, 1158 (9th Cir.1989) (internal citations omitted), *cert. denied*, 493 U.S. 869,
8 (1989). Because petitioner waived his right to collaterally attack his sentence and his claims are
9 meritless, the Court need not conduct an evidentiary hearing.

10 **V. Certificate of Appealability**

11 A prisoner seeking post-conviction relief under § 2255 may appeal a district court's
12 dismissal of the motion only after obtaining a certificate of appealability (COA) from a district or
13 circuit judge. A COA may be issued only where a petitioner has made "a substantial showing of
14 the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2). A prisoner satisfies this standard
15 "by demonstrating that jurists of reason could disagree with the district court's resolution of his
16 constitutional claims or that jurists could conclude the issues presented are adequate to deserve
17 encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

18 Under this standard, the Court finds that no reasonable jurist would conclude petitioner's
19 claims have merit or deserve encouragement to proceed further. Pursuant to Rule 11 of the Rules
20 Governing § 2255 cases, the Court recommends that the district court deny issuance of a COA on
21 petitioner's claims if it dismisses the § 2255 petition. Petitioner should address whether a COA
22 should be issued in his written objections, if any, to this Report and Recommendation.

23

CONCLUSION

For the reasons discussed above, the Court recommends that petitioner's 28 U.S.C. § 2255 motion to vacate or correct his 2010 federal court sentence be **DENIED** and that the Court not issue a COA. A proposed order accompanies this Report and Recommendation.

DATED this 9th day of November, 2010.


BRIAN A. TSUCHIDA
United States Magistrate Judge